(1) Court, U.S.

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No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM KINNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a federal mail fraud prosecution involving telephone solicitation of charitable contributions, may the "scheme or artifice to defraud" be based on statements of the defendant which could not have been the subject of a fraud case in 1874, because they were collateral to the bargain and not "an inducement or motive to the [other party] to purchase," Smith v. Richards, 38 U.S. (13 Pet.) 26 (1839), or "the very ground on which the transaction took place," Farrar v. Churchill, 135 U.S. 609, 615 (1890)?

2. Do rules of lenity and strict construction apply to interpretation of the United States Sentencing Guidelines, requiring the guidelines to be read narrowly, with ambiguities -- such as those in the adjustment for "charity fraud," which different courts have read in different ways -- resolved in favor of the defendant?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Kinney and the United States). Co-defendant and co-appellant Kevin Kelly has petitioned this Court separately from the same judgment and opinion.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM KINNEY respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit filed on April 28, 2000, denying his appeal from a judgment of sentence.

OPINIONS BELOW

The Opinion of the Court of Appeals (per Oakes, J., with Cabranes & Sack, JJ.) is published as United States v. Kinney, 211 F.3d 13. A copy is attached as Appendix A. The district court did not write or publish any opinion; its oral findings on the sentencing issue are transcribed as Appendix B to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit affirming petitioner's conviction and sentence in the United States District Court for the Eastern District of New York was filed on April 28, 2000. Appx. A. A timely petition for rehearing was denied on June 21, 2000. Appx. C. On August 10, 2000, under No. 00A126, Justice Ginsburg extended to Saturday, November 18, 2000, the time for filing a petition for certiorari. This petition is timely filed on the first business day thereafter. Rules 13.1, 13.3, 13.5, 30.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTE AND SENTENCING GUIDELINE INVOLVED

Section 1341 of title 18, United States Code, at all times pertinent to this case, and prior to its amendment in 1994, provided, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined ... or imprisoned ..., or both. ....

18 U.S.C. § 1341.

The Sentencing Reform Act of 1984 provides, in pertinent part:

> **(a) Factors to be considered in imposing a sentence.** -- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. ...
>
> **(b) Application of guidelines in imposing a sentence.** -- The court shall impose a sentence

of the kind, and within the range, referred to in subsection (a)(4) [i.e., the USSG guideline range] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. § 3553.

Section 2F1.1 of the United States Sentencing Guidelines provides:

§2F1.1. Fraud and Deceit ....

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

* * *

(4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; ... increase by 2 levels ....

* * *

STATEMENT OF THE CASE

This petition presents an important question concerning the scope of the federal mail (and wire) fraud statutes, a problem that this Court has addressed repeatedly over the past 90 years. Petitioner was convicted after a trial on charges that he solicited contributions for a charitable organization in New York State by means of false and fraudulent representations and promises.

a. Procedural History

Petitioner Kinney was arrested on a complaint and warrant (and released on personal recognizance), and then indicted on June 18, 1997, in five counts charging mail fraud and conspiracy, 18 U.S.C. §§ 371, 1341, arising out of telephone fundraising for a law enforcement charity in 1992-93. Following a ten-day trial in September and October 1998 before Judge Arthur D. Spatt and a jury, petitioner was convicted on all counts. The defendant moved for judgment of acquittal on all counts under Rule 29.

The district court conducted an evidentiary hearing for sentencing[1] on May 28, 1999. Among other rulings, the court determined that it would impose a two-level adjustment under the federal sentencing guidelines provision that applies when the defendant has misrepresented that he is acting on behalf of a charitable organization. See Appx. B.[2] The court sentenced petitioner Kinney on July 14, 1999, to serve an aggregate 46 months' imprisonment, followed by three years' supervised release, and to pay $250 in special assessments. The district court continued the original recognizance bond as bail pending appeal. The court of appeals affirmed in a published opinion. Appx. A. Viewing the materiality issue as one

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[1] Such proceedings are known in the Second Circuit as "Fatico" hearings. See United States v. Fatico, 603 F.2d 1053, 1057 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980), cited with approval in USSG § 6A1.3 (p.s.) (commentary).

[2] The prosecution had also asked the court to find that the defendant had misrepresented that he was acting on behalf of a governmental agency, but the district court did not make such a finding. See Appx. B.

of sufficiency of the evidence, the court below held "that defendants have not overcome their burden of demonstrating that their convictions were unsupported by sufficient evidence of fraudulent intent." Appx. A10.

With respect to the "charity fraud" sentencing adjustment, the court of appeals ruled that a two-level enhancement under USSG § 2F1.1(b)(4)(A) was properly applied because the "defendants had employed misrepresentations about the use of donated funds and their own identities for personal enrichment." Appx. A15. The court did not explain how this constituted "a misrepresentation that the defendant was acting on behalf of a charitable ... organization." Id.

Rehearing was denied. Appx. C.

b. Statement of Facts

The facts as related at trial are set forth in the court of appeals' opinion. App. A2-A4. The facts are described in more detail in the petition for certiorari recently filed for Mr. Kinney's co-defendant, Kevin Kelly, at 6-8, which statement is here adopted by reference. See Rule 12.4. In short, petitioner Kinney was the founder and vice president of American Interconnect Agency ("AIA"), a professional fundraiser contractor for charitable organizations. In 1992 and 1993, one of AIA's clients was the "Drug Enforcement Agency of New York" ("DEANY"), a non-governmental, nonprofit organization which had the purpose of providing antidrug educational material to police officers. As part of the fundraising, AIA was to produce two "journals" for DEANY, with advertising from contributors. DEANY was to get the first $40,000 raised, after expenses, and AIA could keep all the rest. By May 1993, AIA and raised and turned over the full $40,000. It went on to raise and keep

another $200,000 and had not produced any journals by the time the office was raided by the FBI. Witnesses testified that the telephone solicitors sometimes misrepresented how the money would be used. None of the witnesses who had been contributors testified that any misstatement, other than the plan to print journals, affected their decision to give.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(i). The United States District Court for the Eastern District of New York had subject matter jurisdiction of this case under 18 U.S.C. § 3231, in that the indictment charged federal offenses allegedly committed in that district. Jurisdiction in the court below rested upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below conflicts with this Court's decisions in McNally and Neder by allowing a mail fraud prosecution on a theory that would have been unrecognizable to the Congresses that enacted the mail fraud law in 1872 and 1909.

The federal criminal fraud statutes incorporate many of the limitations of the common law scope of "fraud," including the requirement that a punishable misrepresentation must have been "material." Neder v. United States, 527 U.S. 1, 20-25 (1999). This case presents a compelling factual setting in which to clarify that statements are not "material" in a fraud case if they were "collateral to the bargain."

This case was prosecuted as a case of mail fraud[3] based on false representations. The indictment alleged, and the case was tried, on alternate theories. One was that the defendants claimed that DEANY would print and circulate a journal containing advertisements publicizing the contributors. The other type of alleged misrepresentations concerned the nature of the anti-drug and police-supporting activities in which DEANY engaged. CA2 J.A. 43.[4] The distinction is particularly important in this case, because the former assertion was about something AIA was going to do for the contributors (prepare and print the DEA-NY antidrug advertising journal), while the latter was about what DEA-NY would do for others with the contributions.

The same approach that this Court applied in McNally v. United States, 483 U.S. 350 (1987), and then again in Neder v. United States, 527 U.S. 1, 20-25 (1999), shows that the government's theory of prosecution here was fatally flawed. This Court held in McNally, and reaf-

[3] See Statutes and Guideline Involved, ante, for text of 18 U.S.C. § 1341.

[4] The conspiracy count of the indictment alleged that the defendants "would make and cause to be made false and fraudulent representations to contributors to DEA-NY, including that (1) DEA-NY would produce a narcotics-related, semi-annual publication that would be distributed to thousands of law enforcement officers, local businesses and residents, and to the contributors themselves; (2) DEA-NY would sponsor drug education programs for children; and (3) DEA-NY had established a "death insurance fund" for law enforcement officers." CA2 J.A. 43 (Ind., ct. 1, ¶3, at 2) (punctuation of "DEA-NY" per original).

firmed in Neder,[5] that in enacting the mail fraud law Congress intended to adopt those aspects of the law of fraud, as it had developed in 1872, which are not inconsistent with the statutory language. 527 U.S. at 22. To determine those common law ingredients of fraud, the majority in Neder cited (1) the Restatement (Second) of Torts (ALI 1977); (2) a hornbook, *Prosser and Keeton on Law of Torts* (5th ed. 1984); (3) its own pre-1872 cases applying the common law of fraud; and (4) a respected contemporaneous treatise (Justice Story's *Commentary on Equity Jurisprudence* (10th ed. 1870)). Neder, 527 U.S. at 22-23. Applying the same methodology and consulting the same types of sources to petitioner's alleged misrepresentations show how the court below deviated from controlling law.

Petitioner argued below that an affirmative misrepresentation is not material, and therefore cannot be deemed fraudulent, if it is "collateral to the bargain." In the very sentence this Court quoted in part in Neder from its 1839 decision in Smith v. Richards, 38 U.S. (13 Pet.) 26, the Court continued, "the misrepresentation must be of something material, constituting an inducement or motive to the [other party] to purchase ...,"

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[5] The Neder case holds that a "scheme to defraud" under the mail fraud law, 18 U.S.C. § 1341, must involve deceit which is "material." That precise point was not at issue in this case, but the Court's ratio decidendi is instructive. The common law foundations of the mail fraud statute, as grounded in Nineteenth Century understandings, was unanimously reiterated only a few weeks ago in Cleveland v. United States, 531 U.S. -- (Nov. 7, 2000), clarifying and reaffirming the holding of McNally that the object of the fraud must be to deprive the victim of something which is property.

quoting 1 *Story's Equity* (1836) (emphasis added). Smith, 38 U.S. at 39.[6] Likewise, later in the Nineteenth Century, Chief Justice Fuller's decision for the Court stated:

> The general principles applicable to cases of fraudulent representation are well settled. ... The representation must be in regard to a material fact, [and] must be false .... It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material.

Farrar v. Churchill, 135 U.S. 609, 615 (1890) (emphasis added). See also United States v. New South Farm & Home Co., 241 U.S. 64, 71 (1916) (discussing sufficiency of mail fraud indictment).

Wharton's treatise on criminal law, in the edition closest to the date of enactment of the mail fraud law, concludes that alleged false pretenses "must have been the Operative Cause of the Transfer [of property]." 2 Francis Wharton, *A Treatise on the Criminal Law of the United States* § 2120, at 555 (7th ed. 1874). These authorities all support a conclusion that the exclusion of false statements "collateral to the bargain" was part of the law of fraud in 1872 when the mail fraud law was adopted, and in 1909 when it was last substantively amended, and

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[6] Perhaps ironically, Justice Story (and two others) dissented in Smith v. Richards on the basis that the record did not reveal a strong enough case of fraud. It should be noted further that the Smith case involved a situation in which the buyer had to, and did, place trust and confidence in the seller, as the buyer was not in a position to see or inspect the property being sold, which was a mine.

thus continues as a limitation on the scope of the mail fraud law today.

The alleged misrepresentations here concerning the particular uses to which DEANY would put the contributors' money were "collateral" in this sense. Indeed, of the six victims who testified, not one mentioned that the decision to contribute was influenced in any way by the particular representations which were identified as fraudulent in the indictment or by the court of appeals, other than the promise to print ads in the DEANY journal. The contributors were interested in having their advertisements seen by the types of people to whom the journal was supposedly to be distributed.[7] Although the issue was hard-fought on the facts, and the accuracy of the verdict in this regard is not conceded, the jury must be deemed to have found that the petitioner had no subjective intent to actually publish the journal.

Putting aside sufficiency of the evidence, we do not contest that the representation concerning the journal was material to the contributors. The same is not true, however, of any claims as to the particular programs in which DEANY would engage. These so-called "misrepresentations," on which petitioner's convictions were alternatively based, were collateral and thus not "material" to the contributors' donation decisions and should not have been allowed to form the basis of mail fraud convictions. The court of appeals simply assumed

[7] The contributors may also have been influenced in their decisions to give by the promise of receiving a decal for their automobile window, which they may have thought would provide some assistance in any interaction with a traffic policeman. These stickers, however, were in fact sent; there was no misrepresentation in that regard.

these representations were material. Appx. A9-10. The court did not defend at all, either factually or logically, its rejection of the defense contention that "these misrepresentations did not affect the contributors' understanding of their bargain with DEANY and mislead them as to the nature and quality of DEANY's activities." Appx. A10. The Red Cross commits no "fraud" on its donors if it raises funds by featuring pictures of flood victims while actually spending a large percentage of its receipts on running its blood bank program, for example, or on the salaries of its professional staff and the upkeep of its elegant headquarters building.

Because one of the two "misrepresentation" bases for conviction here was legally insufficient, the court below should have remanded for a new trial. A jury's general verdict cannot survive if one of the government's alternate theories is legally invalid. See Griffin v. United States, 502 U.S. 46, 55-56 (1991) (explaining Yates v. United States, 354 U.S. 298, 312 (1957)); Chiarella v. United States, 445 U.S. 222, 237 n.21 (1980). When a jury is presented, as here, with alternative legal theories, one of which is defective, the verdict must be reversed so long as it is "impossible to tell" whether the jury relied on the erroneous theory. Yates, 354 U.S. at 312. Accordingly, the court below departed from this Court's controlling precedent on a matter of essential principle under the criminal fraud statutes when it failed to award petitioner (and his co-defendant) a new trial.

For these reasons, this Court should issue a writ of certiorari to review and address the fundamental defects in the government's theory of prosecution in this case, under the binding precedent of this Court.

2. The circuits require this Court's guidance on the question whether the "rule of lenity" and the principle of strict construction apply to the interpretation of the United States Sentencing Guidelines where there are ambiguities in their phrasing.

About nine months were added to petitioner Kinney's sentence because of an enhancements to the fraud guideline under USSG § 2F1.1(b)(4)(A).[8] This Court should review and reject the lower courts' misapplication and extension of this sentencing enhancement. This case presents a recurring issue of grave importance in federal sentencing, because the decision below chose the more severe of the available constructions of the applicable guideline, on which there was a split of interpretation in other circuits, in contradiction of most circuits' established application of the rule of lenity to guideline construction questions.

The court below gave a broad construction to a disputed guideline enhancement, Appx. A11-15; 211 F.3d at 19-21, as had the district court, Appx. B, expressly rejecting petitioner's plea for a "narrow interpretation." Appx. A12. While the jury found that frauds were committed in AIA's contracted fundraising efforts on behalf of DEANY, the opinion of the court of appeals fails to show that Mr. Kinney ever "misrepresented that [he] was acting on behalf of a charitable organization," which is the particular form of misconduct, and the only conduct, for which this specific adjustment adds additional punishment. The Tenth Circuit has recognized, as

[8] See Statutes and Guideline Involved, ante, for text of § 2F1.1(b)(4).

the court below acknowledged (App. A14), that this guideline adjustment should not in any fashion be extended in its scope. See United States v. Frazier, 53 F.3d 1105, 1111-15 (10th Cir. 1995).

The court below read the key language of the (b)(4)(A) adjustment as covering misrepresentations which enhance the defendant's personal profit or gain from his action on behalf of a charitable organization. In this, it purported to follow a decision of the Third Circuit, construing the same guideline. See United States v. Bennett, 161 F.3d 171, 190-92 (3d Cir. 1998), cert. denied, 120 S.Ct. 61 (1999).[9] Whether the Third

[9] In fact, the cases are readily distinguishable. See Petition for Certiorari of co-defendant Kelly, filed Nov. 17, 2000, at 17-19. It may be that the defendant in Bennett or in some of the other cases cited as precedent were "technically acting on behalf of a charity, but [were] doing so as a means of benefitting [themselves] personally." Appx. A13. It is hard to see why that would be wrongful, however, without inserting an "only" before either "technically" or before "as a means." (Even then, that test would cause grave consternation among many university or hospital "vice presidents for institutional advancement," for example.) The only sense in which that can be said of petitioner, however, is that under AIA's professional, commissioned fundraising contract with DEANY, he stood to gain more personally the more he raised, not by diverting charitable contributions, however, but simply by virtue of the terms of his (lawful) contract. Moreover, neither petitioner, nor his co-defendant, nor any of the defendants in the adverse cases cited as precedent, ever misrepresented their status as paid fundraisers or salaried employees of the charities in question by claiming, for example, that they were volunteers; the courts in those cases can only have been suggesting that the failure to disclose a personal financial interest in the success of the fundraising activity was somehow fraudulent

Circuit in Bennett or the Tenth Circuit in Frazier settled upon a correct reading of the guideline's language is a question that can be addressed by the Sentencing Commission in a proposed amendment to the guideline or its commentary, and is therefore not one which petitioner presses, in those terms, on this Court.[10] See Braxton v. United States, 500 U.S. 344, 347-48 (1991). The question presented is the methodology by which the court below selected the interpretation to follow. The Second Circuit erred when it expanded rather than limited the guideline's wording, and when it chose the harsher of two alternative readings which had been adopted by other circuits, that is, when it failed to apply a general rule of strict construction or a rule of lenity.

The guideline manual adds two levels to the offense calculation in a fraud case when "the offense involved ... a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency ...." USSG § 2F1.1(b)(4)(A). This adjustment plainly applies, for

_____(cont'd)

and qualifies as a "misrepresentation." That is contrary to a core historical understanding in the law of fraud, however, which penalizes nondisclosure only where there is a violation of a duty to disclose. Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817) (Marshall, Ch.J.); see also Doyle v. Union Pacific Ry., 147 U.S. 413, 427-28 (1893); Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383 (1888). Neither the government nor the courts have suggested any such duty existed or was violated here.

[10] Of course, the proper construction of § 2F1.1(b)(4), as written, is potentially included in the question that is presented.

example, when a defendant fraudulently induced victims to part with their money by claiming to be soliciting on behalf of a respected charity with which the defendant, in fact, has no connection. See, e.g., United States v. Starr, 986 F.2d 281 (8th Cir. 1993) (per curiam) (sentence reversed for failure to prove defendant not authorized to act for named charity). It would also clearly apply, for example, where the defendant persuaded victims to part with their money by lying about the existence of a fictitious charitable organization which is, in fact, nothing but a front for the defendant's bank account. E.g., United States v. Whatley, 133 F.3d 601, 607 (8th Cir. 1998).[11] See generally USSG § 2F1.1, appl. note 4 (p.s.).

Petitioner's conduct corresponded to none of those easy cases, however. The evidence was undisputed that petitioner's for-profit organization, AIA, held a legitimate contract with DEANY, which was a genuine and recognized charity,[12] to engage in fundraising on a

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[11] Compare United States v. Fletcher, 47 F.3d 1176 (9th Cir. 1995) (table; text on WestLaw and CD-ROM) (adjustment reversed for failure to prove any "misrepresentation that the defendant 'was acting on behalf of a charitable ... organization.'" [ellipsis original]).

[12] Of course, having Internal Revenue Code § 501(c)(3) status is not conclusive proof that an entity is, in fact, a "charitable organization." See, e.g., United States v. Smith, 133 F.3d 737, 744-46 (10th Cir. 1997) ("Say No Now," although awarded § 501(c)(3) status, found at sentencing to be nothing but fraud scheme; therefore, truthful statement that defendant represented SNN was "misrepresentation" that he acted "on behalf of" a charity); United States v. Baggett, 129 F.3d 128 (9th Cir. 1997) (table; text on WestLaw and CD-ROM) (same). The government propounded no such theory here as to DEANY.

generous commission basis, which is itself a lawful and widespread arrangement. Indisputably, petitioner actually acted "on behalf of" DEANY at all times. Perhaps the adjustment would apply to a genuine representative of a genuine charitable or religious body who simply pocketed the money donated without turning it over. See, e.g., United States v. Lilly, 37 F.3d 1222 (7th Cir. 1994), cert. denied, 513 U.S. 1175 (1995). Whether it applies to a paid professional fundraiser who simply has a stake in the increased donations to a genuine charity which may be generated by a fraud-tainted pitch is another question, at least where no representation is made that the fundraisers are themselves volunteers.[13]

Most circuits have held that the "rule of lenity" applies to guideline construction, see United States v. Sanders, 162 F.3d 396, 402 (6th Cir. 1998) ("rule of lenity should clearly be utilized ... where, as here, there is no clear language in the Guideline or the Commentary to

[13] The Tenth Circuit in Frazier thus properly refused to follow or extend the holding in United States v. Marcum, 16 F.3d 599, 603 (4th Cir.), cert. denied, 513 U.S. 845 (1994), which upheld an application of this adjustment to a sheriff who skimmed 10% of the take from a nonprofit bingo game. In two sentences of discussion, without any legal or linguistic analysis, the Fourth Circuit read into the defendant's actions the implied (but untrue) assertion that he was "conducting the bingo game wholly on behalf of" the charity, and apparently read into the guideline a further requirement of zero dishonest personal gain. The panel opinion here gives Marcum an uncritical citation, App. A13, when it should have been firmly disavowed. The Fourth Circuit subsequently followed and thus helped entrench the misapplication established in Marcum. See United States v. Aramony, 166 F.3d 655, 663-64 (4th Cir.), cert. denied, 526 U.S. 1146 (1999).

support that increased sentence"); United States v. Bowen, 127 F.3d 9, 13 (1st Cir. 1997); United States v. Booker, 70 F.3d 488, 492 n.18 (7th Cir. 1995) (collecting some cases); United States v. Cutler, 36 F.3d 406, 408 (4th Cir. 1994); United States v. Cheape, 889 F.2d 477, 480 n.8 (3d Cir. 1989) (Becker, J.).

Some, however, have disputed the applicability of the doctrine in this non-statutory context. United States v. Mrazek, 998 F.2d 453, 455 (7th Cir. 1993) (Easterbrook, J.); cf. United States v. McEntire, 153 F.3d 424, 438 & n.16 (7th Cir. 1998) (distinguishing "rule of lenity" from "principles of lenity"). The Second Circuit, in particular, has repeatedly failed or refused to invoke lenity in the interpretation of the Sentencing Guidelines. See United States v. Tran, 2000 WL 1701651, *11 & n.4 (2d Cir., Nov. 15, 2000); United States v. Johnson, 221 F.3d 83, 99 (2d Cir. 2000); United States v. Campbell, 167 F.3d 94 (2d Cir. 1999); United States v. Torres-Echavarria, 129 F.3d 692, 700 n.3 (2d Cir. 1997) (viewing applicability as doubtful); United States v. Westcott, 159 F.3d 107, 117 n.5 (2d Cir. 1998) (noting government's "assertion" that doctrine does not apply).

A Rule of Lenity applies to the judicial resolution of ambiguities in sentencing statutes. See United States v. R.L.C., 503 U.S. 291, 305 (1992); Bifulco v. United States, 447 U.S. 381 (1980); Busic v. United States, 446 U.S. 398, 406-07 (1980); Ladner v. United States, 358 U.S. 169, 178 (1958). This Court should grant the petition in this case to make clear that the rule of lenity applies to ambiguities in the guidelines, just as it does to sentencing statutes. Cf. Babbitt v. Sweet Home Chapter of Communities for Greater Oregon, 515 U.S. 687, 703 n.18 (1995) (considering but not deciding whether rule of

lenity would apply to interpretation of regulation enforceable through statutory criminal penalty).

Since it is at best doubtful that fraudulent tactics turn a defendant's acts on behalf of a genuine charity into a "misrepresentation" that he or she is "acting on behalf of" that charity, there is a "grievous ambiguity or uncertainty in the [guideline]." Muscarello v. United States, 524 U.S. 125, 139 (1998) (quoting earlier cases). In other words, "after seizing everything from which aid can be derived," it is possible only to "guess as to what [the drafter] intended." Id. at 138, quoting Reno v. Koray, 515 U.S. 482, 499 (1995). Thus, the rule of lenity requires that the rule be given the narrower scope. Ratzlaf v. United States, 510 U.S. 135, 148-49 (1994). Accord, Cleveland v. United States, 531 U.S. -- (Nov. 7, 2000), slip op. at 12; Castillo v. United States, 530 U.S. --, 120 S.Ct. 2090, 2096 (2000).

The Sentencing Reform Act suggests that the rule of lenity should apply to guideline interpretation just as it does in the interpretation of statutes. Even giving "due deference to the district court's application of the guidelines to the facts," 18 U.S.C. § 3742(e), the conclusion of the court below is insupportable. It is fair to say that petitioner's sentence "was imposed in violation of law," id. § 3742(e)(1), and "as a result of an incorrect application of the sentencing guidelines," id. § 3742(e)(2), because it is inconsistent with the principle of parsimony Congress built into the present sentencing system: "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment, as set forth in the Act." 18 U.S.C. § 3553(a) (emphasis added);[14] see also id. § 3553(b) (court also

[14] See Statutes and Guideline Involved, ante, for text of § 3553.

"shall impose" sentence within guideline range, properly computed, absent legitimate departure). These doctrines are applicable to the Commission as well as to the courts. See 28 U.S.C. § 994(b)(1) (guidelines must be designed so as to comply with all provisions of title 18, including § 3553(a)).

The result of the lower courts' overbroad reading of the charity institution adjustment in this case was the unjustified addition of nearly a year to petitioner's prison sentence. This Court should grant certiorari to review and reverse the decision below, and the case must then be remanded for resentencing.

CONCLUSION

For the foregoing reasons, petitioner WILLIAM KINNEY prays that this Court grant his petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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November 18, 2000.

APPENDIX A

211 F.3d 13

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 99-1345, -1501

UNITED STATES of America,
Appellee,

v.

William KINNEY and Kevin KELLY, also known as John Moore, also known as Jack Murphy,
Defendants-Appellants.

(Argued: Feb. 3, 2000 Decided: April 28, 2000)

*15 Jonathan I. Edelstein, New York, N.Y. (Abraham Abramovsky, of counsel), for Defendant-Appellant Kinney.

Gary Schoer, Syosset, NY, for Defendant-Appellant Kelly.

James Tatum, Jr., Assistant United States Attorney, Brooklyn, N.Y. (Loretta E. Lynch, United States Attorney, David C. James /and Jo Ann Navickas, Assistant United States Attorneys, of counsel), for Appellee.

Before OAKES, CABRANES and SACK, Circuit Judges.

OAKES, Senior Circuit Judge:

William Kinney and Kevin Kelly ("defendants") were convicted of conspiracy and mail fraud based on their involvement with a fundraising effort for a law enforcement charity. The United States District Court for the Eastern District of New York, Arthur D. Spatt, Judge, entered the convictions pursuant to a jury verdict and imposed sentences of incarceration. Defendants appeal their convictions primarily on the ground that there was insufficient evidence to support the jury's verdict. Additionally, defendants appeal their sentences on several fronts. Because we find that defendants' convictions were adequately supported by the evidence and their sentences were properly calculated, we affirm.

BACKGROUND

Defendants worked for a company called American Interconnect Agency ("AIA"), a business which contracted with various charitable organizations to solicit funds on their behalf. Kinney was the vice president and founder of AIA, and Kelly was the office manager. In the fall of 1992, AIA contracted to raise funds for the Drug Enforcement Agency of New York ("DEANY"), a non-profit organization not connected to the federal Drug Enforcement Administration whose primary purpose was to educate police officers. The one-year contract provided that AIA would solicit potential contributors to DEANY within the state of New York and sell them advertising space in two journals that would be produced by AIA during the contract term and distributed widely to DEANY's 1200 members and all its contributors. Of the money raised by AIA, the first

$40,000 was guaranteed to DEANY and AIA was to keep what remained after paying the costs of solicitation and journal production.

The contract was negotiated by Kinney and John Belizzi, the executive director of DEANY. During these negotiations, Belizzi specified that AIA could not make misrepresentations in its solicitations as to the purpose of the contributions or the identity of the solicitors. In particular, Belizzi emphasized to Kinney that AIA salespeople should not hold themselves out as police officers or as connected with the Drug Enforcement Administration of the United States Department of Justice. Belizzi also told Kinney that the salespeople should not tell potential contributors that funds raised would be used to educate children or to put more police officers on the street. Belizzi did not state to Kinney that the funds would be used to buy bulletproof vests or to supplement a death fund for police officers slain in the line of duty.

DEANY received the $40,000 guaranteed under the contract in May 1993. By the end of the contract year, however, AIA had not published either of the two journals as promised, although it had raised over $200,000 -- in addition to the $40,000 given to DEANY -- through its advertising solicitations. In November 1993, AIA's records were seized by the U.S. Postal Inspection Services and arrest warrants were issued for defendants, charging them with mail fraud. Defendants were ultimately indicted for mail fraud and conspiracy based on their alleged misrepresentations that (1) they would produce the *16 journals; and (2) that contributors' money would go to drug education programs and death benefits for families of slain police officers.

At trial, the government presented testimony from people who had been solicited by AIA and contributed money to DEANY in exchange for advertising space in the promised journals. These witnesses testified that the AIA salesmen had told them that their donations would go to drug education for children, that the salesmen identified themselves as law or drug enforcement officers, and that they were told that their advertising would appear in the next journal. Because AIA had not published a journal by November 1993 when its records were seized, none of these witnesses ever received the expected advertising. The government also introduced testimony from two AIA salesmen who said that they consistently made misrepresentations as to their identities and as to how the solicited funds would be used, and that they did so based on "pitch sheets" prepared by Kinney.

Additional testimony was presented from people involved in preparing to publish the journals. Kinney's secretary testified that she sorted advertising copy as it came in from contributors and put it in a box in Kinney's office, where it was found in the November 1993 seizure. A graphic designer testified that he communicated with Kinney about the journal, but never received any advertising or editorial copy from him.

Kinney testified on his own behalf that he had collected advertising and editorial copy for the DEANY journal and taken steps to have the journal published. He claimed that he had sent editorial copy to the graphic designer, but mistakenly used the wrong address so that it never was received. Kinney also testified that he instructed his salesmen not to represent themselves as police officers or tell contributors that their money would go to drug education. Kelly did not testify.

After the jury returned a guilty verdict on all counts in October 1998, the district court held hearings on sentencing. Based on the hearings, the district court calculated defendants' sentences as follows: In addition to the base offense level, each defendant's offense level was increased for the amount of loss produced by the fraud, the fact that the scheme involved more than minimal planning and/or more than one victim, and the fact that defendants misrepresented that they were acting on behalf of a charitable organization. The district court also enhanced Kinney's sentence on obstruction of justice grounds because he perjured himself at trial, and enhanced Kelly's sentence because of his role as a manager.

Kinney's and Kelly's convictions and sentences were entered by judgment on July 14, 1999 and June 10, 1999 respectively. This appeal followed.

DISCUSSION

Defendants appeal the sufficiency of the evidence supporting their convictions for mail fraud, arguing that they did not make false or material misrepresentations and that they lacked the requisite fraudulent intent for the crime. Defendants also contest the propriety of their sentences on several fronts, the most significant being that it was erroneous to apply a two-level enhancement for misrepresenting that they were acting on behalf of a charitable organization. We will discuss each of these arguments in turn.

I. Sufficiency of the Evidence

As we recently reiterated in United States v. Salameh, 152 F.3d 88, 151 (2d Cir. 1998), a defendant

challenging the sufficiency of the evidence leading to his conviction "bears a heavy burden." Id. (quoting United States v. Masotto, 73 F.3d 1233, 1241 (2d Cir. 1996)). We must sustain the conviction if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond *17 a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). In analyzing the evidence, we "credit[] all inferences and credibility assessments that the jury might have drawn in favor of the government and view[] the evidence as a whole rather than piecemeal." United States v. Aulicino, 44 F.3d 1102, 1114 (2d Cir. 1995) (internal citations omitted). As the Supreme Court stated in Jackson, this approach "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." 443 U.S. at 319.

The crime of mail fraud, which served as the basis for defendants' conviction, has three elements: "(1) use of the mails to further (2) a scheme to defraud with (3) money or property as the object of the scheme." United States v. Gole, 158 F.3d 166, 167 (2d Cir. 1998). It is the second element that defendants contend was not supported by sufficient evidence in this case -- namely, that the misrepresentations alleged in the indictment amounted to a scheme to defraud. Defendants claim that the government did not prove that the alleged misrepresentations were false, material, or demonstrated the requisite intent to defraud required under United States v. Dinome, 86 F.3d 277, 283 (2d Cir. 1996) ("fraudulent intent is essential to a scheme to defraud." (internal quotation omitted)).

We find no merit in defendants' contentions. At the heart of the government's case was the charge that defendants misrepresented the fact that AIA would print contributors' advertising in two journals. Defendants do not argue that this misrepresentation was not material, but rather that the government failed to prove that they did not intend to publish the journals. To support their argument, they cite the case of United States v. D'Amato, 39 F.3d 1249, 1261 n.8 (2d Cir. 1994), for the proposition that fraudulent intent cannot be inferred from mere non-performance of a contractual obligation. Defendants claim that, based on D'Amato, the government did not prove that at the time defendants solicited advertising from contributors, they did not intend to publish the journal.

We cannot agree with defendants' argument. Unlike the case at bar, D'Amato turned on the allegation that the defendant had not performed services provided for in a contract between him and Unisys, the party he was accused of defrauding. See id. at 1261. Here, the misrepresentations at issue were made not to DEANY, the other party to the AIA contract, but rather to the individual contributors solicited by defendants. More importantly, the evidence in D'Amato demonstrated that Unisys never expected the defendant to provide the services at issue and therefore no criminal intent could be established from his failure to do so. Id. ("There is ... no dispute that D'Amato performed all the services for Unisys that were requested of him."). In this case, even if the contributors to DEANY could be said to have entered into a contract with AIA, they clearly expected to get their advertisements published in a journal and never did. Thus D'Amato's holding, which is based on the

distinction between breach of contract and fraud, is of negligible assistance to defendants.

The government offered the following evidence of defendants' criminal intent to defraud DEANY's contributors by not publishing the journals: (1) the fact that the advertising copy received from contributors was found in Kinney's office at least five months after the last promised date of publication; (2) testimony by Bellizzi that he repeatedly inquired about the status of publication but never saw any efforts toward publication; (3) testimony by the graphic artist that he did not receive any copy for the journal and reminded Kinney in May and June 1993 that none had been provided; (4) testimony by a contributor that Kelly told him that the journal would be published monthly; (5) testimony by *18 AIA salesmen that Kelly knew that no journal would ever be published; and (6) Kinney's post-arrest misrepresentation that there was an escrow account to cover the cost of publication. Assessing this evidence in the light most favorable to the government, as we must, we find it was sufficient to establish that defendants acted with the requisite criminal fraudulent intent.

Indeed, defendants offer very little to challenge such a finding. The only credible evidence offered that raises a competing inference regarding intent is Kinney's assertion that journal copy was mis-delivered in June 1993, necessitating a trip to Albany for additional copy. This "fact," however, comes from Kinney's own testimony and therefore goes only to the weight of the evidence, not its sufficiency. See United States v. Ramirez, 79 F.3d 298, 306 (2d Cir. 1996). "The weight of the evidence is a matter for argument to the jury, not a ground for reversal on appeal." Id.; see also United States v. Miller, 116 F.3d

641, 676 (2d Cir. 1997). In analyzing a sufficiency of the evidence claim, "[w]e defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." United States v. Morrison, 153 F.3d 34, 49 (2d Cir. 1998) (citation omitted). Here, the jury was entitled to disbelieve Kinney's self-serving testimony and find that defendants possessed the necessary intent to defraud contributors with the misrepresentation that the journals would be published. With respect to the other misrepresentations alleged in the indictment -- that AIA's salesmen claimed that contributions would go to drug education and to a death insurance fund -- we see no reason to revisit the substantial evidence that these statements were indeed false, material, and used in furtherance of a fraudulent scheme. Defendants place heavy reliance on United States v. Starr, 816 F.2d 94 (2d Cir. 1987), and United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970), in arguing that because contributors to DEANY were not misled about the fact that they were donating to a charitable organization, and were misled only about the uses of the donated funds, they were not defrauded by defendants' misrepresentations. In Starr and Regent, we found that in order to establish mail fraud, there must be some harm contemplated to the victim of the fraud that goes to the nature of the bargain itself. See Starr, 816 F.2d at 99 (finding no fraud because "there was no discrepancy between benefits reasonably anticipated and actual benefits received" (internal quotation omitted)); Regent, 421 F.2d at 1182 (no fraud when misrepresentations did not "affect[] the customer's understanding of the bargain nor

... influenc[e] his assessment of the value of the bargain to him"). If defendants "in no way misrepresented to their customers the nature or quality of the service they were providing," Starr, 816 F.2d at 99, then statutory mail fraud cannot exist.

Here, the victims of defendants' fraud -- the DEANY contributors -- were given false information about how their money would be spent, and made a decision whether to donate money based on that information. We cannot agree with defendants that these misrepresentations did not affect the contributors' understanding of their bargain with DEANY and mislead them as to the nature and quality of DEANY's activities. In such circumstances, we have not hesitated to hold that Starr and Regent have no application. See United States v. Walker, 191 F.3d 326, 335-36 (2d Cir. 1999) (finding mail fraud when lawyers exacted fees for false asylum applications submitted without regard for client's needs or intentions); United States v. Frank, 156 F.3d 332, 336 (2d Cir. 1998) (Starr does not apply when customer "did not receive the service ... for which they had contracted and paid"); United States v. Paccione, 949 F.2d 1183, 1197 (2d Cir. 1991) (reliance on Starr and Regent misplaced when "there [wa]s no question that ... customers did not get what they paid *19 for"). Because defendants' dishonesty was not incidental to the contributors' decision to make donations to DEANY, but rather was aimed at influencing those decisions directly, an intent to defraud was established.

In sum, we find that defendants have not overcome their burden of demonstrating that their convictions were unsupported by sufficient evidence of fraudulent intent. We will therefore not disturb the judgment of the jury that defendants were guilty of mail fraud.

II. Sentencing

Defendants challenge the district court's enhancement of their sentences pursuant to the United States Sentencing Guidelines ("U.S.S.G.") § 2F1.1(b)(4) (1998),[1] which allows a two-level enhancement where the offense involved "a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization." See id. On appeal of a sentence, we apply a de novo standard of review to the court's legal determinations, giving due deference to the district court's application of the guideline provision to the facts. See United States v. Echevarria, 33 F.3d 175, 178 (2d Cir. 1994).

The correct interpretation of U.S.S.G. § 2F1.1-(b)(4) as applied to charitable solicitations has yet to be addressed by this Court. The district court adopted the reasoning of United States v. Bennett, 161 F.3d 171 (3d Cir. 1998), to conclude that although defendants were authorized to solicit funds for DEANY, their misrepresentations as to the use of donated funds, the publications of the journals, and their identities were designed to enhance personal gain and thus came within the meaning of Section 2F1.1(b)(4). Defendants now urge us to reject Bennett as a minority approach and instead hold that a Section 2F1.1(b)(4) enhancement is warranted only when

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[1] We note that throughout the briefs, all parties refer to the applicable Guideline provision as Section 2F1.1(b)(3). Although this was the correct citation prior to the 1998 Guidelines, amendments in 1998 put the applicable provision at U.S.S.G. § 2F1.1(b)(4). Because defendants were sentenced in 1999, the 1998 Guidelines apply. See U.S.S.G. § 1B1.11(a).

a defendant either acts on behalf of a bogus organization or misrepresents that he has authority to act on behalf of a legitimate organization.

A close reading of Bennett and the cases from other circuits addressing the application of Section 2F1.1(b)(4) convince us that the district court's approach was the right one. In Bennett, the defendant created a Ponzi scheme in which he induced people to buy into a charitable organization with the promise that their money would be doubled by an anonymous donor and be donated to the charity of their choice. 161 F.3d at 174. Bennett then relied on the donations of subsequent investors to pay out on original deposits and frequently dipped into the funds to benefit himself personally. Id. at 174-75. Following his fraud conviction and sentencing, Bennett appealed, arguing that Section 2F1.1(b)(4) did not apply because he was at all times acting on behalf of a legitimate charitable organization. Id. at 191. The court rejected this "narrow interpretation of the enhancement" and found that even though the charitable organization was legitimate:

> Bennett used his position there to ensnare donors with falsehoods designed to generate contributions. He exploited his victims' altruism to reap personal, pecuniary gain. We find no authority for the proposition that the enhancement applies only if the "charitable" organization is fraudulent from its inception and in every facet of its operations .... Regardless of their motivation to give money to [the organization], donors had a right to expect that their contributions would be used in the manner that Bennett had promised.

*20 Id. at 191-92. The court then held that Section 2F1.1(b)(4) is properly applied in a case where the defendant is technically acting on behalf of a charity, but is doing so as a means of benefitting himself personally. Id. at 192.

Other circuits have reached equivalent conclusions. In United States v. Aramony, the court held that an enhancement under Section 2F1.1(b)(4) is appropriate "even if the defendant did not misrepresent his authority to act on behalf of a particular organization, but rather only misrepresented that he was conducting an activity wholly on behalf of such organization." 166 F.3d 655, 664 (4th Cir. 1999). In that case, the CEO of the United Way of America (UWA), who diverted institutional funds for his personal use, was found to have "misrepresent[ed] that he was acting wholly on behalf of UWA in soliciting donations." Id.; see also United States v. Marcum, 16 F.3d 599, 603 (4th Cir. 1994) (enhancement applies to sheriff who misrepresented that he was conducting bingo games solely to benefit a local sheriff's organization when he was actually pocketing 10% of the proceeds). Similarly, in United States v. Lilly, 37 F.3d 1222, 1228 (7th Cir. 1994), the court found that a church pastor who encouraged his congregation to invest in church-sponsored certificates of deposit and then used the funds partially for his personal benefit had misrepresented that he was acting on behalf of a legitimate organization as contemplated by Section 2F1.1(b)(4).

Defendants cite two cases that they claim represent the "majority" view with respect to Section 2F1.1(b)(4)'s application. One, United States v. Starr, 986 F.2d 281 (8th Cir. 1993), is readily distinguishable from this case. There, Starr's conviction for bank fraud was based on a

bounced check, not on any misrepresentation that he was acting on behalf of a charity. Id. at 282. The fact that the check was from the account of a charitable organization was entirely incidental to Starr's conviction, and the court found that no increase under Section 2F1.1(b)(4) was justified.

Defendants are better served in their reliance on United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995), which involved a defendant who misused federal grant funds to purchase computers rather than to provide computer training. The court declined to follow the Fourth Circuit's holding in Marcum, limiting the application of Section 2F1.1(b)(4) to cases in which "the defendant exploits his victim by claiming to have authority which in fact does not exist" rather than "us[ing] funds to which [an] organization was entitled for unauthorized purposes." Id. at 1113. The court based its alternative holding on its conclusion that "the particular social harm which the Sentencing Commission perceived as justifying an enhanced sentence of one who falsely represents one's authority -- the exploitation of victims' generosity and charitable motives -- [wa]s completely lacking." Id. at 1114-15 (internal quotation omitted).

No other circuit has adopted the position set forth by the Tenth Circuit Court of Appeals in Frazier. See Aramony, 166 F.3d at 664 (affirming the reasoning and holding of Marcum); Bennett, 161 F.3d at 192 (distinguishing Frazier on grounds that it did not involve active solicitation that exploited charitable impulses); United States v. Ferrera, 107 F.3d 537, 543 (7th Cir. 1997) ("We have implicitly rejected Frazier's reasoning limiting applicability of the Guideline to defendants who have no actual authority to act on behalf of the organization

involved."). Moreover, the background commentary to the fraud guideline states that the "guideline is designed to apply to a wide variety of fraud cases.... Use of false pretenses involving charitable causes ... enhances the sentences of defendants who take advantage of victims' trust in ... law enforcement agencies or their generosity or charitable motives." U.S.S.G. § 2F1.1 cmt. (backg'd). We are convinced that Bennett represents the better interpretation of *21 Section 2F1.1(b)(4) and its accompanying comment, and therefore decline to follow Frazier to the extent that it is in disagreement with Bennett.

Applying the reasoning of Bennett to this case, the district court correctly concluded that defendants had employed misrepresentations about the use of donated funds and their own identities for personal enrichment. While we recognize that "boiler room" contracts such as the one entered into by DEANY and AIA are not illegal, defendants raised in excess of $200,000 for themselves by relying partially on unauthorized solicitation tactics. Despite having been specifically prohibited by the executive director of DEANY from holding themselves out as law enforcement officers and from representing that donated money would go to student drug education and an officers' death benefit fund, defendants used such misrepresentations, as well as the allure of widespread distribution of the promised journals, to induce people to contribute. Defendants' conduct fits comfortably into Bennett's criteria of "ensnar[ing] donors with falsehoods designed to generate contributions .... [and] exploit[ing] ... victims' altruism to reap personal, pecuniary gain." 161 F.3d at 191. We therefore affirm the application of a two-level enhancement to their sentences under U.S.S.G. § 2F1.1(b)(4).

III. Defendants' Other Arguments

Defendant Kelly claims his conviction was tainted because the district court erroneously admitted evidence of uncharged wrongful acts under Federal Rule of Evidence 404(b). Additionally, defendants challenge their sentences on a variety of other grounds, including the district court's amount of loss calculation, its finding that Kelly was a manager, and its finding that Kinney had obstructed justice by perjuring himself at trial. We have considered defendants' arguments on all these points and find them to be without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court in all respects.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	CR-97-0567
v.	:	U.S. Courthouse
WILLIAM KINNEY, KEVIN KELLEY,	:	Uniondale, New York
Defendants.	:	Fatico Hearing & Sentencing
		May 28, 1999, 1:30 p.m.

BEFORE: HONORABLE ARTHUR D. SPATT,
United States District Judge

* * * *

[56]* * * The guidelines 2F1.1, subdivision B4. ... The application notes, note five says subsection [(b)(4)(A)] provides an adjustment for misrepresentation ... that a defendant, for a defendant who poses as a federal collection agent in order to collect a delinquent student loan. That is one of the examples that they give.

In this case there is substantially [sic] testimony that the purport of the call was that this was somebody acting on behalf of police organizations, for police purposes, for programs, for children to say no to drugs, for widows of police officers. That was the real thrust of the telephone call that procured the money. So that there was a twofold reason for people to contribute. One, as a journal and for business, which of course they were not

going to get. Two, because it was also a charitable contribution. The defendant Kinney's witness testified about that.

The defendant raises the argument that they were acting on behalf of a legitimate charitable organization. [57] I agree with the government that the objection was addressed and rejected by the Court of Appeals for the Third Circuit in United States against Bennett, 161 F.3d 171.

In the Bennett case the defendant also contended that even though he made false statements to donors while soliciting money on behalf of the charitable corporation, he was authorized to and acting on behalf of a legitimate charitable organization. The Court held, "Assuming the Foundation for New Era constituted a genuine charitable organization in some respects, it is clear that Bennett used his position there to enhance donors with falsehoods designed to generate contributions. He exploited his victims' altruism to reap personal gain. We find no authority for the proposition that the enhancement applies only if the charitable organization is fraudulent from its inception and in every facet of its operation. Nor does it matter that many of Bennett's victims acted partially out of self interest ... Regardless of their motivation in giving money to New Era, donors had a right to expect that their contributions would be used in the manner that Bennett had promised.

I also agree with the government in their memorandum when [it] states on page four, "Here Kinney sought to exploit the charitable nature of the [58] DEANY by making fraudulent representations to potential donors, i.e., that their money would be used to educate school children about the dangers of drug abuse.

Additionally, Kinney misrepresented that the donors would have advertising space in the DEANY journal that would be distributed throughout New York State. As the evidence at trial clearly established, the money was never meant to go to educate school children about the dangers of drugs and no journal was ever produced.

Therefore, I find that the government has proved by a preponderance of the evidence that the offense involved a misrepresentation[] that the defendant was acting on behalf of a charitable organization as set forth in Section 2F1.1[(b)(4)(A)]. The enhancement of two levels will stand.

* * * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-first day of June two thousand.

USA — 99-1501
v — Dkt No: 99-1345(L)
Kinney

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant William Kinney.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: s/Beth J. Meador
Beth J. Meador,
Administrative Attorney

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